APPEAL NO. 030432
FILED APRIL 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 16, 2003. The hearing officer determined that the appellant (claimant) did not have good cause for failing to submit to the May 7, 2002,[1] required medical examination (RME) and, as a result, the claimant is not entitled to temporary income benefits (TIBs) from May 15 through July 2, 2002. The claimant has appealed the determination that she had no good cause for failing to attend the RME with the resultant suspension of TIBs on evidentiary sufficiency grounds, as well as the asserted failure of the respondent (carrier) to comply with the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(b) and (h) (Rule 126.6(b) and (h)). The carrier urges affirmance of the hearing officer's decision and asserts that it complied with Rule 126.6(b).

DECISION

Reversed and rendered.

At the outset we acknowledge that the hearing officer is the sole judge of the weight and credibility that is to be given to the evidence. (Section 410.165(a)). That said, we base our reversal on the undisputed evidence.

This case involves the application of Rule 126.6(b) and (h). Rule 126.6(b) provides, in part, that all examinations ordered must be scheduled to occur within 30 days after receipt of the order, with at least 10 days notice to the employee. The claimant contends that the May 7 RME was not scheduled within 30 days of receipt of the order and that the claimant was notified of the scheduled RME less than 10 days before it was scheduled. The claimant testified that she moved from (city 1), state 1, to live with her sister in (state 2) on March 15, 2002. She continued to receive mail at the city 1 address and this address was the one on file with the Texas Workers' Compensation Commission (Commission) on the dates in question. The claimant testified that her relatives in city 1 would contact her regarding any mail received from the Commission or the carrier. The carrier requested an RME for the claimant on three different dates, March 13 and 27, and April 13. The Commission approved the March 27 request for an RME on April 1. The Request for Medical Exam Order (TWCC-22) was forwarded to both the claimant and the carrier. There is no evidence in the record of the date the parties received the TWCC-22 but, applying Rule102.5(d), the deemed date of receipt was April 7. The RME appears to have been scheduled within 30 days of the time that the carrier was deemed to have received the order from the Commission approving the RME. The claimant testified that she talked to the carrier by telephone on April 2 or 3 and learned of the scheduled RME of May 7. The RME doctor's office, (clinic), sent a letter dated April 11, notifying claimant of the May 7 RME, and a reminder letter dated April 30. Both letters were sent to the city 1 mailing address. The claimant

[1] All dates are in 2002 unless otherwise indicated.

testified that these letters from the clinic remained unopened until she returned to state 1 on May 6, as her relatives were only instructed to tell her about letters from the Commission or the carrier.

Compliance with the notification requirements of Rule 126(b) is a fact question for the hearing officer. The hearing officer reviewed the record and found that the written notice of the RME scheduled for May 7 was sent to the claimant's address of record on April 11 and again on April 30 (Finding of Fact No. 2) and that the claimant had at least 10 days notice of the scheduled May 7 RME appointment (Finding of Fact No. 3). These Findings support an implicit conclusion that notification requirements for the RME were met. We conclude that the hearing officer's finding that the claimant had proper notice of the scheduled RME is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W. 2d 175,176 (Tex. 1986).

Rule 126.6(h) provides, in part, that a carrier can suspend TIBs if an employee, without good cause, fails to attend an RME. A carrier can presume that the employee did not have good cause if by the day the examination is to occur the employee has both:

i. failed to submit to the examination; and

ii. failed to contact the RME doctor to reschedule the examination within seven days

The undisputed evidence is that the claimant, during her conversation with the carrier on April 2 or 3, requested that the RME be rescheduled to be accomplished in state 2 because she did not know when she could return to state 1. Additionally, she asked the carrier about travel reimbursement and informed the carrier that she was on 72-hour notice to return to state 1 if a termination hearing with her employer was scheduled. The record reflects no further communication from the carrier regarding scheduling of the RME of May 7. The claimant's uncontradicted testimony was that she contacted the Commission on April 25, in an attempt to schedule an RME in state 2. Telephone logs corroborate that phone calls were made to the appropriate phone numbers on the dates alleged by the claimant. Evidence shows that the claimant faxed a letter to the carrier on May 3 informing the carrier that she would not be attending the May 7 RME (*see* Claimant's Exhibit No. 6). She testified that she called the RME doctor's office on the same day in an attempt to reschedule the RME in state 2, and was told that she would have to talk to the adjuster about that. There is no evidence in the record that the carrier ever contacted the claimant about an RME in state 2 after their phone conversation. The next communication from the carrier to the claimant was the notification that the claimant's TIBs were suspended for failing to attend the May 7 RME in state 1 (*see* Claimant's Exhibit No. 11). It is undisputed that carrier canceled the May 7 RME (*see* Carrier's Exhibit No. 5). Although the claimant actually returned to state 1 on May 6 because she had received a letter of termination from her employer, she did not attend the May 7 RME, which she understood had been canceled.

Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 002816, decided January 17, 2001, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for good cause is that of ordinary prudence; that is, the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. In view of the evidence presented, we conclude that the hearing officer abused her discretion in determining that the claimant did not have good cause for failing to attend the RME on May 7. A prudent individual will not attend an RME that has been canceled by the carrier. The evidence shows that the claimant was entitled to believe that the RME was canceled and would be rescheduled in state 2. But for the fact that she returned to state 1 on May 6 for a termination hearing, she would not have been in state 1 at the time of the previously scheduled and then canceled RME appointment of May 7. We note that the hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We find no conflict in the evidence regarding the cancellation of the RME of May 7 by the carrier. It is undisputed. Concerning Findings of Fact Nos. 4, 5, and 6, appealed by the claimant, we are satisfied that these findings are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain, *supra.* Under the circumstances of this case, the claimant did not fail to attend the May 7 RME appointment without good cause. The undisputed evidence was that the carrier had been in communication with the claimant and was aware that she was in state 2. The fact that she was out-of-state when she became aware of the RME and her efforts to have it rescheduled in state 2 caused the RME doctor's office to refer her back to the adjuster, rather than rescheduling as would normally happen. We cannot place the blame on the claimant for not getting the examination rescheduled with the RME doctor when his office sends her back to the adjuster. The conclusion that the claimant did not have good cause for failing to submit to the RME is not adequately supported by factual findings.

Accordingly, we reverse the hearing officer's determination that the claimant did not have good cause for failing to attend the RME on May 7, 2002 and is not entitled to TIBs from May 7 to July 2, 2002, and render a new decision the claimant had good cause for failing to attend the May 7 RME and is entitled to TIBs from May 7 to July 2, 2002.

The true corporate name of the insurance carrier is **AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Roy L. Warren
Appeals Judge